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No. .....

In The
Supreme Court of the United States
October Term, 1987

SPORTS DESIGN & DEVELOPMENT, INC.
AND BILL LEWIS, INDIVIDUALLY,

Appellants,

vs.

JAMES HEDDON'S SONS, INC.,

Appellee.

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPELLANTS' PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the District Court erred by dismissing the action as a discovery sanction under Fed. Rule Civ. P. 37(b)(2) without first imposing less drastic sanctions or specifically finding that less drastic sanctions would not substantially achieve the deterrence value of Rule 37.

2. Whether the District Court abused its discretion by dismissing the action under Fed. Rule Civ. P. 37(b)(2) without first specifically finding that the violation of the prior discovery order was not caused in whole or in part by the party's attorney.

3. Whether a Court of Appeals can supply findings of fact essential to affirm the decision of the District Court when the District Court made no such findings.

4. Whether the District Court abused its discretion by dismissing the case as a discovery sanction under Fed. Rule Civ. P. 37(b)(2) without first allowing the appellants a full hearing and opportunity to explain their failure to comply with a prior discovery order.

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TABLE OF AUTHORITIES

CITATIONS TO OPINIONS BELOW

The decisions and orders of the United States District Court for the Western District of Louisiana and the United States Court of Appeals for the Fifth Circuit are not reported. The text of the decisions and orders are contained in the appendix hereto at pages A-1, A-4, A-6 and A-10.

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STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit which Sports Design & Development, Inc. and Bill Lewis seek to have reviewed is contained in the appendix attached hereto at page A-6. The opinion of the Court of Appeals was rendered on August 25, 1987. The order denying Sport Design's petition for rehearing was entered on October 3, 1987.

This appeal is being docketed in this Court within 90 days after the entry of the Order Denying the Appellants' Petition for Rehearing. Jurisdiction to review the orders and decrees of the Court of Appeals by writ of certiorari is conferred by 28 U.S.C. § 1254(1) and § 2101(c).

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UNITED STATES CONSTITUTIONAL PROVISION INVOLVED

Fifth Amendment (Due Process):

"No person shall be . . . deprived of life, liberty, or property without due process of law . . ."

APPLICABLE FEDERAL RULE OF CIVIL PROCEDURE

The only Federal Rule of Civil Procedure applicable to this petition is Rule 37(b)(2)(C) which states in pertinent part:

> (2) *Sanctions By Court In Which Action Is Pending*
>
> "If an officer, director or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> . . . (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party; . . ."

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STATEMENT OF THE CASE

Sport Design & Development, Inc. and Bill Lewis (hereafter jointly referred to as "Sports Design") sued James Heddon's Sons, Inc. ("Heddon") for breach of contract in the United States District Court for the Western District of Louisiana. During the discovery stage of the litigation, the District Court dismissed Sports Design's complaint as a discovery sanction. Sports Design is seeking reversal of that order and the United States Court of Appeal order affirming the order of dismissal.

During the litigation, Heddon served a set of requests for production on Sports Design. During a document production in response to the requests, numerous disputes arose as to the documents being produced and the method of production which resulted in motions for sanctions being filed by both Sports Design and Heddon. In addition, Heddon filed a motion to compel and a motion for summary judgment. After a hearing, the trial court denied the motions for sanctions and the motion for summary judgment and granted Heddon's motion to compel ordering that the documents be produced by May 15, 1986. The documents were not produced by the deadline and on June 4, 1986, Heddon filed a second motion for sanctions. The District Court then ordered Sports Design to comply by July 4 or suffer dismissal. By agreement, the documents were to be produced on August 20, 1986.

Heddon then noticed two depositions for August 20, 1986, one was Marcie Lewis Olsen, an employee of Sports Design, and the other was the "Custodian of Records, Files and Documents" of Sports Design who was to produce the documents covered by the original request for production. Prior to the deposition, Sports Design had prepared the documents for production and one of several employees could have presented them to Heddon on as little as fifteen minutes notice. Immediately prior to the deposition, counsel for Sports Design met with the attorney for Heddon and informed him that he was withdrawing as counsel for Sports Design. Even so, the deposition continued without Sports Design, Bill Lewis or any employee of Sports Design being aware that its attorney was withdrawing from the case.

Prior to the deposition, Sports Design's attorney, Mr. Nida, had been told that the officer originally intending to bring the documents to the deposition was ill and Mr. Nida would need to speak to others in the company to have the documents available. Even so, Mr. Nida did not make any such request. At the deposition of Marcie Olsen, counsel for Heddon requested the documents, but Mr. Nida had taken no action to inform any other officer of the corporation that the documents were not available at the deposition. Bill Lewis, who was attending the deposition as an observer, even offered to take whatever action he could to help resolve the situation. Mr. Lewis' offer was refused by the attorney for Heddon and was not responded to by Mr. Nida.

The following day, Mr. Nida withdrew as counsel. Sports Design offered to produce the documents and did produce them, but the documents were refused in the form produced. On August 25, Heddon filed a motion for sanctions alleging that the documents were not produced at the time agreed upon by the parties. Prior to the hearing on the motion, the District Judge who had previously presided over the litigation transferred the case to District Judge F. A. Little, Jr. Judge Little's first participation on the case was presiding over Heddon's motion for sanctions. At the hearing, the first witness called by Sports Design was Bill Lewis. Bill Lewis began his testimony by stating that he was present at Marcie Olsen's deposition and that Mr. Nida left the room with the attorney for Heddon before the deposition began. About fifteen minutes later they reappeared and the deposition began. Mr. Lewis stated in the hearing on the motion for sanctions that when

the question of the records arose, he could easily have gone to his office and obtained the records and returned them to the deposition since the records have been ready for production for over a year. Once the Court heard Mr. Lewis state that the records had been ready for production for over a year, the Court stated:

> "I think that's all I need to hear, that's fine. I'm certainly going to grant the motion for sanctions without any question about that. Whether I'm going to dismiss the suit, I will take that under advisement, but those records have not been delivered, there has been no cooperation at all. That is what I find as a matter of fact. . . ."

Counsel for Sports Design did not attempt to proffer any additional testimony from Mr. Lewis or any explanation as to Mr. Nida's activities once the Court cut off Mr. Lewis' testimony. Likewise, no opportunity was given for additional witnesses or testimony. Counsel for Heddon did, however, introduce the deposition of Marcie Olsen into evidence.

On January 28, 1987, Judge Little issued his "ruling" on the motion for sanctions and dismissed Sports Design's complaint. The court's Ruling lamented the fact that "[n]o adequate explanation has been given for the failure to deliver those records even though Bill Lewis testified that the records had long since been prepared." Even though the Court did not allow Mr. Lewis to complete his testimony or allow other testimony to be introduced, no proffer of the remainder of Mr. Lewis' testimony was offered by Sports Design's counsel at the hearing. Judge Little's order also did not make any finding regarding the use of less drastic sanctions or whether the failure to produce the

documents was attributable to Sports Design's attorney. On appeal, the United States Court of Appeals for the Fifth Circuit affirmed the decision of the District Court, and made additional findings of fact including a finding that less drastic sanctions would not have deterred Sports Design and the failure could not be attributed to the attorney for Sports Design.

Jurisdiction of the District Court was based on diversity of citizenship under 28 U.S.C. § 1332(a)(1).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Certainly a District Court has discretion under Rule 37 of the Fed. R. Civ. P. to dismiss an action as a discovery sanction for a party's failure to comply with an order compelling discovery. As this Court stated in *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976), "The question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing." Rule 37 is, as this Court has held, the exclusive authority authorizing the District Court to dismiss a case as a discovery sanction. *Societe Internationale v. Rogers*, 357 U.S. 197 (1958).

The Circuit Courts of Appeal for the various circuits have created various standards by which the discretionary power of the District Court can be reviewed. Two of the most commonly used standards are that:

(1) dismissal is proper only in situations where the deterrent value of Rule 37 cannot be substantially achieved by the use of less drastic sanctions; and

(2) dismissal is improper where the neglect is plainly attributable to an attorney rather than a blameless client.

Batson v. Neal Spelce Associates, Inc., 765 F.2d 511 (5th Cir. 1985); *Poulis v. State Farm*, 747 F.2d 863 (3rd Cir. 1984); *Wyle v. R. J. Reynolds Industries, Inc.*, 709 F.2d 585 (9th Cir. 1983); *Sanctions: Rule 11 and Other Powers*, ABA Federal Procedure Committee, Litigation Section (1986).

In the present case, the District Court did not address in its opinion whether less drastic sanctions would be appropriate even though the documents were prepared for production and Sports Design had even attempted production. Although the sanction of dismissal can be used to deter others, its availability should, as some circuits have ruled, be limited only to those situations where less drastic sanctions have first been attempted or the District Court has made a specific finding that less drastic sanctions would not achieve the ends of Rule 37. The District Court made no such finding.

Even though the Fifth Circuit Court of Appeals previously ruled that the sanction of dismissal is not authorized when the failure to comply with the court order is attributable to an attorney rather than a blameless client, the District Court made no specific finding of such in the present case. Since the Courts of Appeal for the various circuits have enumerated the standards for review in de-

termining whether a dismissal as a discovery sanction constitutes an abuse of discretion, Sports Design contends that a substantial issue is presented to this Court such as to require the District Courts to make specific findings consistent with standards of the applicable Court of Appeals or standards to be created by this Court.

In the present case, there should be no question that the District Court's opinion does not contain the findings of fact necessary to determine whether the District Court abused its discretion in dismissing the case as a discovery sanction, i.e. there is no finding that less drastic sanctions were inappropriate or the neglect was due to the fault of the attorney rather than the client. On appeal, the Court of Appeals for the Fifth Circuit supplied the findings of fact essential to affirm the decision of the District Court even though the District Court had made no such findings. Such findings of fact should not be supplied by the appellate court, especially when the matter being considered is the dismissal of the case with prejudice. *Securities & Exchange Com. v. Chenery Corp.*, 318 U.S. 80 (1943). When a lower court does not allow the testimony to be completed in the hearing on the motion for sanctions, as when the District Court prevented Mr. Lewis from testifying further, the Court of Appeals should not be able to supply the essential findings of facts when the record was not completed.

Finally, Sports Design contends the District Court abused its discretion by dismissing the case as a discovery sanction without first allowing Sport Design a full hearing and opportunity to explain their failure to comply with the

prior discovery order. This Court has previously stated that the provisions of Rule 37 allowing dismissal of a complaint must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law. There are thus constitutional limitations upon the power of courts to dismiss an action as a discovery sanction without affording a party the opportunity for a hearing on the merits. *Societe, infra.* Where, as in this case, the District Court: (1) held a hearing on the Motion for Sanctions, but only allowed the first witness to testify for a few minutes; (2) stopped the hearing and stated that, "I think that's all I need to hear, that's fine"; and (3) did not make the findings necessary to comply with the standards decided by the Court of Appeals for the Fifth Circuit in order to exercise the sanction of dismissal, due process was not afforded to the party to explain its failure to comply with the Court's order compelling discovery. In the present case, if Bill Lewis had been allowed to testify, he would have explained that the documents had not been produced because he was relying on his attorney to advise him when production was to take place and had been ready and able to produce the documents for over a year. Had he been advised to produce the documents, they could have been produced that same day. Had Mr. Nida relayed to any officer of the corporation that the custodian of records was sick and could not appear at the deposition, another person could have been appointed to deliver the documents. Since the Court did not hear that testimony and other testimony, Sports Design was not afforded the type of hearing that should have been required to impose a sanction of dismissal. The record on appeal does not reflect this addi-

tional testimony by Bill Lewis as it was not proffered by counsel for Sports Design at the hearing.

Respectfully submitted,

SPORTS DESIGN &
DEVELOPMENT, INC.
AND BILL LEWIS,
INDIVIDUALLY

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

SPORTS DESIGN AND
DEVELOPMENT, INDIVIDUALLY,
and BILL LEWIS, INDIVIDUALLY

-vs- CIVIL ACTION NO. 84-1997-A

JAMES HEDDON'S SONS, INC.

(Filed January 28, 1987)

RULING

The substance of plaintiffs' suit has been previously summarized in a decision rendered by the Honorable Edwin F. Hunter, Jr. We will not reiterate his precis. We need only remark that plaintiffs' suit is one for damages for breach of contract. The damage claim approaches $2,000,000. The initial filing occurred in July of 1984.

Defendant filed a motion for sanctions on 25 August 1986. The plaintiffs failed to produce properly requested records at a propertly noticed deposition. The plaintiffs failed to comply with an order of this Court dated 9 June 1986. Not only does the defendant demand attorney fees but also dismissal with prejudice as provided by Rule 37.

The record has been reviewed by this Court before and after the hearing of 21 January 1987. Plaintiffs' failure to cooperate, respond, participate, deliver or otherwise react as is required by 20th century litigating principles is so egregious as to support without trepidation a judgment of dismissal with prejudice. One need only ask a few unanswered questions:

1. Where are the records which were to be delivered to a deposition of 20 August 1986? No adequate explanation has been given for the failure to deliver those records even though Bill Lewis testified that the records have long since been prepared.

2. Why have plaintiffs failed to respond to the defendant's discovery request as per order of Judge Hunter dated 9 June 1986? That order provides in part:

> The only order that will now issue is this: Plaintiffs are to respond on or before July 1, 1986, to defendant's discovery request or suffer dismissal.

One need only read this record and discover a course of conduct by the plaintiffs. That course is a willful and intentional failure to comply with discovery rules and a flagrant disregard for orders from this Court. That continuous pattern has nullified any meaningful attempt by the defendant to prepare itself for defense of the serious allegations of the plaintiffs. Nothing short of dismissal under Rule 37 is justified. See *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 97 S.Ct. 2778, 49 L.Ed. 747 (1976). Nothing less should be expected. See Order of Honorable Edwin F. Hunter, Jr. dated 9 June 1986.

Defendant's request for reimbursement for the cost of the Olsen deposition is DENIED. The deposition was taken. Although the records were not provided or produced, the deposition was not aborted. Defendant is entitled to attorney fees for processing this motion. The sum of FIVE HUNDRED AND NO/100 ($500.00) DOLLARS would be an adequate recompense. Defendant will

provide an appropriate judgment and submit same to this Court within twenty (20) days.

SIGNED in Alexandria, Louisiana on 28 January 1987.

/s/ F. A. Little, Jr.
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

SPORTS DESIGN AND DEVELOPMENT, INC., and LEWIS, Individually	)	CIVIL ACTION
Plaintiffs	)	NO. CV84-1997-A
v.	)	
JAMES HEDDON'S SONS, INC.,	)	(Filed February 17, 1987)
Defendant	)	

JUDGMENT

This Motion for Sanctions, filed by defendant and counterclaimant, JAMES HEDDON'S SONS, INC., was heard on January 21, 1987. After considering the pleadings, evidence and argument of counsel, the Court being of the opinion that the law is in favor of defendant, for the written reasons assigned in its ruling of January 28, 1987, it is:

ORDERED, ADJUDGED AND DECREED that plaintiffs' lawsuit be and is hereby dismissed with prejudice at plaintiffs' costs;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiffs pay defendant's attorney fees in the amount of Five Hundred and No/100 ($500.00) Dollars.

Signed in Alexandria, Louisiana on this the 17th day of February, 1987.

/s/ F. A. Little, Jr.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-4244

Summary Calendar

SPORTS DESIGN AND
DEVELOPMENT, INC. and
BILL LEWIS, INDIVIDUALLY,

Plaintiffs-Appellants,

versus

JAMES HEDDON'S SONS, INC.

Defendant-Appellee.

Appeal from the United States District Court for the
Western District of Louisiana

(CV-84-1997)

(August 25, 1987)

Before CLARK, Chief Judge, WILLIAMS, and DAVIS, Circuit Judges. PER CURIAM:*

The plaintiffs in this case, Sports Design and Development, Inc. and Bill Lewis, individually, appeal the district court's dismissal of their case under Federal Rule of Civil Procedure 37 as a sanction for failing to comply with a discovery order. We affirm the dismissal of this case.

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

Background

The plaintiffs sued the defendant James Heddon's Sons, Inc. ("Heddon") for breach of a contract to manufacture and market fishing lures designed by Bill Lewis. Their pleading asserted almost $2,000,000 in damages. The complaint was filed in July 1984. In January 1985, Heddon began the discovery process by deposing Bill Lewis. Later, Heddon filed a motion to compel discovery of documents it had requested and both parties filed motions for sanctions. The district court denied the motions for sanctions and referred the discovery process to a Magistrate. The Magistrate granted Heddon's motion to compel and ordered that all outstanding discovery requests be responded to by May 15, 1986. Heddon filed a second motion for sanctions on June 4, 1986, asserting the plaintiffs had still failed to respond.

At this point the district court ordered that: "Plaintiffs are to respond on or before July 1, 1986, to defendant's discovery request or suffer dismissal." On July 1, the plaintiffs still had not produced documents requested by Heddon. Heddon then noticed the deposition of the "records custodian" of Sports Design. On the day of the deposition, the person Sports Design had chosen to respond, Buddy Lewis, did not appear and the documents were not produced.

The plaintiffs' attorney filed a motion to withdraw as counsel, asserting he had been "unable to secure cooperation from plaintiffs necessary for the prosecution of their claim." This motion was granted. Heddon then filed its third motion for sanctions.

The district court held a hearing on Heddon's motion in January 1987. The plaintiffs testified the documents had been assembled since 1985, although they were not delivered to the defendants until the morning before the hearing. Plaintiffs asserted they still needed further time to retain an economic expert to analyze the twelve boxes of documents before they could tender the documents to the defendant in manageable form. They asserted their prior attorney had not informed them of the necessity of producing the documents at the deposition scheduled for the "records custodian." However, Bill Lewis testified that he knew the records had been requested.

I.

The sanction of dismissal is an extreme remedy that may only be applied as a last resort. Bluitt v. Arco Chemical Co., 777 F.2d 188, 191 (5th Cir. 1985). However, the district court has broad discretion and may only be reversed for an abuse of that discretion. *Id.* The test in this circuit is whether: 1) the failure to comply with the court's order was willful or in bad faith; 2) the deterrent value of Rule 37 cannot be achieved by using less drastic sanctions; 3) the failure to comply is not attributable solely to the attorney; and 4) the other party's preparation for trial has been prejudiced. Batson v. Neal Spelce Associates, Inc., 765 F.2d 511, 514 (5th Cir. 1985).

All of these factors have been met in this case, making the sanction of dismissal entirely appropriate. The district court found "a willful and intentional failure to comply with discovery rules." Given the plaintiffs own testimony that the records had been assembled since 1985 and that

they knew those records were to be produced at the August deposition, the failure to produce them is certainly willful.

The plaintiffs failed to substantially comply with repeated discovery requests and with orders by the magistrate and the district court. Such conduct indicates that another court order would not have deterred the plaintiffs from being uncooperative in the future. Even their delivery of the documents on the morning of the hearing is evidence of bad faith. They delivered twelve boxes of uncataloged documents and demanded the defendants immediately make copies and return them.

The plaintiffs cannot attribute the two years of delayed discovery to their attorney. They were aware of the discovery requests and failed to show any tendency to cooperate. They continued to be uncooperative after their attorney withdrew from the case.

The district court found that the plaintiffs conduct "has nullified any meaningful attempt by the defendant to prepare itself for defense." Certainly the documents were essential for the defendant to determine what the issues would be and how they could be defended. The plaintiffs brought a two million dollar claim and then failed to pursue preparation of their own case and obstructed preparation of a defense. The sanction of dismissal is appropriate.

Conclusion

We affirm the judgment of the district court.

AFFIRMED.

Filed October 3, 1987

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH COURT

No. 87-4244

SPORTS DESIGN AND DEVELOPMENT,
INC. AND BILL LEWIS, INDIVIDUALLY,

Plaintiffs-Appellants,

versus

JAMES HEDDON'S SONS, INC.,

Defendant-Appellees.

Appeal from the United States District Court for the
Western District of Louisiana

ON PETITION FOR REHEARING

(October 2, 1987)

Before CLARK, Chief Judge, WILLIAMS and DAVIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Charles Clark
United States Circuit Judge